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No. 82-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC., *Petitioners*,

v.

WILLIE MAE PAYNE, *et al.*, individually and on behalf of all others similarly situated, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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WILLIE MAE PAYNE, et al.,

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RESPONDENTS' BRIEF IN OPPOSITION TO DEFENDANTS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Petitioners, who were defendants below in this fair employment case, have asked this Court to grant a writ of certiorari and summarily vacate the decision below, on the ground that the court of appeals erred in overturning the district court's asserted finding of no

discriminatory purpose in the defendants' hiring practices, and in assertedly substituting its own finding of discriminatory purpose.

Consideration of the defendants' petition requires an examination of the actual findings made by the district court, of the actual actions taken by the court of appeals, and of the representations made by the defendants in both of the lower courts. These are set out at length below. The key omissions in the defendants' Statement of the Case may be summarized as follows:

(1) Contrary to the defendants' statement, the district court did make express findings of subjective racial discrimination against blacks in hiring and in promotions by the defendants' personnel officials and supervisors, and it made no conflicting

findings (see infra at 6-19);

(2) Contrary to the defendants' statement, the court of appeals merely affirmed the district court's findings of subjective discrimination as adequately supported by the evidence, and did not overturn any district court finding on intentional discrimination or attempt to substitute its own judgment on this question for that of the district court (see infra at 19-23);

(3) before both the district court and the court of appeals, the defendants judicially admitted what they here deny: the existence of district court findings of subjective racial discrimination against blacks in hiring and promotions. Far from challenging the existence of such findings, the

defendants asked the court of appeals to overturn the findings as not adequately supported by the evidence (see infra at 23-28);

(4) the point the defendants seek to raise before this Court was not raised at all before the district court, and was raised before the court of appeals only on the defendants' petition for rehearing (see infra at 28-32).

SUMMARY OF ARGUMENT

Plaintiffs submit that the question the defendants seek to raise in their petition does not arise in this case. The petition is based on a single sentence taken out of context from the district court's opinion, and incorrectly describes the actions of both lower courts. The decision of this Court last Term in Pullman-Standard v. Swint, 72 L.Ed.2d 66

(1982) would not allow the court of appeals to have reached any conclusion in this case different from the conclusion it did reach: that the district court's findings of subjective racial discrimination were not clearly erroneous, and that they must be affirmed.

Until the filing of their petition for rehearing, the defendants never challenged the principle that the district court had made findings of subjective racial discrimination. Instead, their challenge before the court of appeals was limited to the argument that the district court's admitted findings of subjective racial discrimination were not adequately supported by the record. These judicial admissions both serve as a strong corroboration of the clear meaning and purport of the district court's findings, and demonstrate that the defendants have

not adequately raised any contrary point below.

ARGUMENT

A. The District Court Found Intentional Discrimination by the Defendants' Personnel Officials and Supervisory Officials

1. The District Court's 1976 Findings on Liability

The district court made as clear as possible its findings that the defendants' personnel and supervisory officials had engaged in subjective discrimination. It began by stating the context of the defendants' actions:

> Prior to 1964, the defendants' work force was composed entirely of whites except for custodial or janitorial jobs. This exclusion of blacks from noncustodial jobs was based in part upon conformity to local racial traditions.

416 F.Supp. 248, 254, Pet.App. 8a. It continued, stressing the uncontrolled subjective discretion the defendants gave

their local officials in hiring decisions. Mr. Taylor, who was personnel manager at the plant from 1950 until 1966, was found to have received no written instructions from company management as to the standards he was to use in deciding which applicants to hire. The district court found: "His decisions were based mainly upon subjective factors and community references or recommendations played an important role in the hiring process." The recommendations largely came from an all-white committee of the Chamber of Commerce. 416 F.Supp. at 254, Pet.App. 7a-8a. When reliance upon community recommendations began to decline, the district court found: "[H]e concurrently began to rely more heavily upon his own subjective judgment in determining whether to accept an applicant for employment." Id.

The district court found that Mr. Taylor decided to impose two new hiring requirements---a tenth-grade education or G.E.D. equivalency certificate and referral by the Mississippi State Employment Service in 1965 ---contemporaneously with the end of the formal policy barring blacks from hire into Operative [Material Handler and Assembler] positions. Under the new policy, MSES referred only persons who met the tenth-grade requirement. Prior to that time, no blacks had been hired into Operative positions. 416 F.Supp. at 254, Pet.App. 8a-9a. The district court drew the inference that the imposition of the new educational requirement was related to racial considerations:

> In concluding that the education requirement is not job related, the court considers it highly pertinent that the standard was not adopted until the defendants began desegregating their work

> force in order to comply with the Civil Rights Act of 1964. United States v. Georgia Power Co., 474 F.2d 906,912 (5th Cir. 1973). Although the Cleveland plant had operated successfully for more than fifteen years without an educational policy of any sort in regard to the employment process, in 1965 Travenol determined to establish the tenth grade requirement for all noncustodial jobs, including the assembler and material handler positions which make up more than three quarters of Travenol's entire work force.

416 F.Supp. at 256-57, Pet.App. 13a (footnote omitted).

Mr. Taylor's successors as Personnel Manager enjoyed unfettered discretion as to applicants who satisfied the new educational requirement and were referred by MSES. After briefly discussing a personnel manager who served for a very short period, the district court described the hiring decisions of James Self, who served as personnel manager from July 15, 1968 through August 31, 1974. Finding that Mr. Self had been

given no instructions whatsoever, the district court continued: "During Mr. Self's tenure, hiring decisions as to persons referred by MSES were based primarily on subjective factors." 416 F.Supp. at 255, Pet.App. 9a.

The district court's many references to subjective decisionmaking were not mere surplusage. The court tied the subjectivity directly to racial discrimination in its discussion of "The Overall Effect of Defendants' Hiring Practices for Operative Positions":

> The record reflects that once an applicant for an operative job at Travenol has hurdled the tenth grade barrier, the hiring decision is based primarily on subjective factors. These job decisions are made by defendants' personnel managers without written instructions or directives from corporate headquarters. Among applicants for these positions who met the requirement of referral by MSES while it was in effect, the defendant hired proportionately fewer blacks. Defendants' records reflect that for the period from April, 1971 through August, 1974, one of every

> three white applicants for operative positions at Travenol was hired, but only one of every six black applicants was hired. This disparate result reflects the combined effect of a tenth grade requirement and of the defendants' subjective discrimination.

416 F.Supp. at 257, Pet.App. 14a.

Nor did the district court stop at that point in its discussion of subjective discrimination. It found that one of the most important factors in making promotional decisions was "the opinion of the employee held by his or her supervisor and certain officials of the personnel department." In discussing this factor, the district court found:

> And dependence upon the recommendation of defendants' predominantly white supervisory force is a "ready mechanism" to further impede black access to the supervisory ranks.

416 F.Supp. at 261, Pet.App. 21a.

From the above discussion, there can be no doubt that the district court

actually found subjective discrimination by the defendant's personnel officials and supervisory officials. The defendants seek to overcome these findings by a single statement of the district court, which they have taken out of context to suggest that the district court found no intentional discrimination in defendants' hiring process. The statement in question actually appears under the heading "Discrimination in Promotion", and follows the paragraph containing the above discussion of supervisory recommendations:

> The overall impression of the defendants' operation of their Cleveland plant which the court acquired at the trial in this case is one of well intentioned management attempting to deal with job applicants and employees, equally on a case by case, or individual basis; however, the employment policies which defendants adopted in apparent good faith have had the effect of substantially impeding the entry of blacks into the company's work force. The full

> extent of the cumulative effect of these policies is perhaps not yet appreciated by Travenol management, but the statistics brought forth in this case cannot fail to convince an objective observer that employment opportunities at Travenol's Cleveland plant were certainly, and to some extent remain, far from equal at the times pertinent to this case.
>
> While it is no doubt true that a great deal of the segregated nature of defendants' operation in Cleveland may be traced to the racial discrimination which has historically permeated American society in general, by passage and implementation of the Civil Rights Act of 1964, the Congress of the United States announced that the time has arrived to bring minorities into the work force of the nation's industries on an equal footing with persons of the majority race. ...

416 F.Supp. at 261, Pet.App. 21a-22a.

Plaintiffs submit that there is no conflict between this statement and the district court's earlier findings of classwide subjective discrimination. A company which decides to use an almost completely subjective personnel system is

liable for the uses its personnel officials and supervisors make of the authority thus given them, but the corporation's shareholders, directors, and senior management do not ordinarily intend that the personnel officials and supervisory officials use their powers so as to engage in racially disparate treatment. Seen from the perspective of the corporate managers and directors, there was no intent to discriminate; seen from the perspective of the personnel officials and lower-level supervisors making the decisions challenged in this case, there was disparate treatment. The same set of facts can be challenged under both theories. Compare Sledge v. J.P. Stevens & Co., 585 F.2d 625, 635 (4th Cir., 1978), cert. den., 440 U.S. 981 (1979) (disparate impact) with the decision below, 673 F.2d at 816-17 (disparate treatment). This Court itself has recognized that the

same set of facts may give rise to both forms of analysis: "Either theory may, of course, be applied to a particular set of facts." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

There is thus no inconsistency between the district court's findings that there was subjective discrimination at the lower levels for which the defendant is liable, and its finding that there was no intent to discriminate at the highest levels of the company. While plaintiffs submit that the district court's 1976 findings are abundantly clear on this subject, the district court's subsequent actions made it clear beyond cavil that subjective discrimination had been found.

2. The District Court's January 24, 1979 Order Referring Back Pay Claims to the Magistrate

The defendants have not reproduced

in their Appendix the district court's Order of January 24, 1979, referring the back pay claims in this case to the Magistrate. In that Order, the district court stated that the back pay claims of class members to be considered by the Magistrate include:

> (1) Claims of denial of employment in production jobs because of subjective discrimination in job interviews prior to February 19, 1976; ... .

This Order is set forth in the Appendix to this Opposition to the Defendants' Petition for a Writ of Certiorari, Opp. Cert.App. 1a, 3a. In a separate Order entered on the same day, the district court stated that its specification of back pay claims shall be taken as making any further findings necessitated by the specification. Opp.Cert.App. 5a.

3. The District Court's Decree

On August 18, 1980, the district

court entered a decree which stated in paragraph 3: "The defendants shall not permit their personnel or supervisory officials to engage in subjective discrimination on the basis of race ... in violation of Title VII ... or of 42 U.S.C. § 1981, in hiring and promotion decisions." Pet.App. 40a. This prohibition of further subjective discrimination in violation of 42 U.S.C. § 1981 was entered long after the Fifth Circuit had made clear that § 1981 prohibited only intentional discrimination. Williams v. DeKalb County, 582 F.2d 2 (5th Cir., 1978).

4. Conclusion as to the District Court's Findings

The district court's 1976 decision on liability, its 1979 order referring the back pay claims to the Magistrate, and its 1980 decree all make abundantly clear that the district court had found subjective discrimination by the

defendants' personnel officials and lower-level supervisory officials. Such discrimination clearly satisfies the standards of disparate-treatment analysis, and is clearly tantamount to a finding of discriminatory purpose. Cf. Castaneda v. Partida, 430 U.S. 482, 494-97 (1977) (statistical showing of significant underrepresentation of Hispanics on grand juries, coupled with proof of "highly subjective" decisionmaking, gives rise to an inference of intentional discrimination). The defendants' petition does not ask for a re-examination of either the settled rule that an employer is liable for the disparate treatment of blacks by its own personnel officials and supervisory officials, or of Castaneda's common-sense statements that subjective discrimination is intentional discrimination. The defendants' petition rests or falls on the accuracy of its description of the

district court's actions, and that description has been shown above to be inaccurate.

B. The Court of Appeals Merely Affirmed the District Court's Findings of Subjective Discrimination, and Did Not Substitute Its Judgment of the Ultimate Issue for That of the District Court

While the defendant urges that the court of appeals substituted its own judgment for that of the district court on the ultimate issue of intentional discrimination, a reading of the opinion below makes such an interpretation impossible to sustain. The court of appeals began by quoting the district court's finding that Travenol's hiring of a disproportionately small number of blacks was the effect of both the tenth-grade requirement and of the defendants' subjective discrimination. 673 F.2d at 816, Pet.App. 67a. The court then proceeded to inquire whether the district court's

ultimate finding of subjective discrimination was supported by adequate evidence in the record---the only inquiry the defendants asked the court of appeals to make. (See infra at 25-28). The court of appeals first canvassed the district court's subsidiary findings of fact, and found that---if they were supported in the record---they were an adequate basis from which the district court could properly draw the inference of subjective discrimination which it had in fact drawn. 673 F.2d at 818-20, Pet.App.71a-75a. The court of appeals next canvassed the record, to determine if the district court's subsidiary findings of fact were clearly erroneous. It found that they were well grounded in the record. 673 F.2d at 820-24, Pet.App. 75a-82a.

The discussion of the court of appeals is replete with marks of deference to the district court's fact finding.

E.g., "The statistics in the record, however, amply support the district court's findings and we may not set them aside as clearly erroneous", 673 F.2d at 820, Pet. App. 75a; "While Payne's statistics are not perfect, we find that they clearly suffice to support the district court's findings of a disparate result", 673 F.2d at 823, Pet.App. 80a; "Travenol offered two statistical alternatives in rebuttal, but the district court was not persuaded. We find that the district court's rejection of Travenol's evidence was not clearly erroneous", 673 F.2d at 823, Pet. App. 81a; on promotions, the errors in the defendants' exhibits "detract from the force of the defendant's proof, and the district court's decision to reject it is not clearly erroneous", 673 F.2d at 826, Pet.App. 87a; finally, the court of appeals remanded two issues for determination by the district court, so

that the district court would be able to find the facts in the first instance. 673 F.2d at 823, Pet.App. 80a. These are not the actions of a court riding rough-shod over the district court's superior ability to find facts, but those of a court paying great deference to that ability.

The defendants seek to make much of the court of appeals' statement that it was applying the "clearly erroneous" test to the district court's subsidiary findings of fact, petition at 9, but this does not establish that the court of appeals failed to give proper deference to the district court's ultimate finding of subjective discrimination. While the opinion below did not contain a parallel statement expressly applying the "clearly erroneous" test to the district court's ultimate conclusion, that fact is of no moment. This Court's certiorari power

does not exist to make editorial changes in appellate opinions, and an editorial change is all that is in question because the district court clearly made findings of subjective discrimination which were clearly upheld on appeal.

C. The Defendants Have Judicially Admitted that the District Court Found Subjective Discrimination in Hiring

1. Admissions in the District Court

On June 4, 1980, the defendants in this case sent to the Clerk for filing a document styled: "Defendants' Proposals Concerning Final Injunctive Relief". It was filed on June 9, 1980. In that document, the defendants admitted to the district court what they now contest before this Court: that the district court did in fact find subjective discrimination against blacks in hiring:

> Subjective discrimination in hiring operatives. The Court has

> ruled that defendants no longer discriminate in hiring. The Court's order referring this matter to the Magistrate provides that claims based on subjective discrimination in hiring do not exist beyond February 19, 1976. Order of January 24, 1979, at 2. This is consistent with the Court's statements that hiring discrimination was most evident "during the early years in dispute in this case, 1970 and 1971," 416 F.Supp. at 258, and that "Travenol's employment practices, particularly prior to 1973, were not consistent with the requirements of Title VII ... ." Id. at 261. ...
>
> Where, as here, voluntary employer action has eliminated a discriminatory practice, the Court cannot properly enjoin the practice. ...

Defendant's Proposal at 3. A copy of this document has been lodged with the Clerk.

Similarly, when the defendants objected to the Magistrate's Report and Recommendation Concerning Further Injunctive Relief, they did not challenge the principle that the district court had found subjective discrimination in hiring,

but argued instead that such discrimination had ended by February 19, 1976:

> Injunctive relief concerning hiring finds no basis in the Court's prior rulings. With respect to subjective discrimination in hiring, this Court has indicated to the precise contrary, that prospective injunctive relief is not proper. It expressly limited the scope of this issue to pre-February 19, 1976 claims in its January 24, 1979 Order of Reference on back pay. ...

Defendant's Objections to the Magistrate's Report and Recommendation Concerning Further Injunctive Relief, dated August 11, 1980 and filed August 13, 1980, at 6. A copy of this document has been lodged with the Clerk.

2. Admissions to the Court of Appeals

In its brief to the court of appeals, the defendants again recognized what was self-evident: that the district court had found subjective discrimination in hiring. Their appeal was based not on any lack of a dispositive finding, but on

the contention that the district court's finding was not based upon adequate evidence. The defendants' Statement of Issues in their January 5, 1981 opening brief stated as the first issue:

Statement of Issues

> 1. Could the District Court properly find that defendants' consideration of subjective factors in hiring for operative positions discriminated against black females where the record (a) contains no evidence that defendants intentionally rejected applicants on the basis of race or sex, (b) shows affirmatively that the factors relied upon did not exclude a disproportionate number of black females, (c) shows that the factors relied upon were related to job performance and (d) contains no suggestion that the factors were a pretense?

Defendants' opening brief at 1-2.[1/]

1/ The defendants' statement of the questions presented does not ask this Court to review the sufficiency of the evidence underlying the conclusion of both lower courts that company personnel officials and supervisory officials did in fact engage in disparate treatment discrimination against blacks. Accordingly, plaintiffs do not address the issue here.

Similarly, the defendants' Summary of Argument made clear that the defendants were asking the court of appeals to overturn the district court's finding of subjective discrimination in hiring:

> Summary of Argument
>
> 1. The injunction against subjective discrimination in hiring operatives is based on findings not supported by the record. Plaintiffs failed to make a prima facie showing of disparate treatment. ...

Id. at 13. A copy of the defendants' opening brief has also been lodged with the Clerk.

Where the defendants in a case have expressly represented to the court of appeals that there was in fact a finding of subjective discrimination below, and expressly restrict their challenge to the question whether the evidence of record is sufficient to support the district court's ultimate conclusion, it is unsurprising

that the resulting opinion contains no lengthy discussion of the admitted fact that there was an ultimate finding of subjective discrimination below. It is equally unsurprising that the resulting opinion affirming that ultimate finding would discuss the "clearly erroneous" rule only in connection with the district court's subsidiary findings of fact. The court had been led to believe that that was the only issue.

D. The Defendants Have Waived Their Contention by Failing to Urge to the Court of Appeals that the District Court Had Not Found Subjective Discrimination

The defendants' representations to the court of appeals are set forth above. Having led the court of appeals, through its April 22, 1982 decision on liability, to believe that there was no question as to the district court's entry of a finding

of subjective discrimination, the defendants challenged the existence of such a finding for the first time in their petition for rehearing before the court of appeals. Their petition was denied without elaboration, and they now seek to make the same point to this Court.

Plaintiffs submit that the defendants have waived any such point. If they had raised it at the district court level, the district court could have entered yet another explicit finding, on top of all of the others it had entered, and so dispelled any doubt the defendants might have had on the subject. Instead, the defendants reassured the district court that its findings were adequate. If the defendants had raised it on their appeal before the court of appeals handed down its decision, the court of appeals could have addressed the issue specifically in its opinion. Instead, the defendants

reassured the court of appeals that a finding of subjective discrimination had been made.

The defendants' failure to raise the point until after they had lost on the merits on appeal cannot be explained by the intervening decision in Pullman-Standard, because the point at issue is whether the district court in fact made findings of subjective discrimination. In both lower courts, the defendants maintained that such findings had been made until they lost; now, they say that no such finding was ever made. Pullman-Standard has no bearing on such a question of historical fact; if the district court's ultimate findings were admittedly adequate to resolve the issue while the defendants thought they had an acceptable chance of success meeting the findings head on, they should not be allowed now to complain to this Court that Pullman-Standard

somehow makes the same ultimate district court findings inadequate.

The inappropriate nature of the relief sought by the defendants is underscored by the fact that, if successful, they would probably obtain a new trial. The district judge who decided this case, Hon. Orma R. Smith, is now deceased and any new findings would have to be made by a different judge. While some evidentiary proceedings will be required by the court of appeals' remand order, this is a far cry from retrying the basic liability issues already tried seven years ago.

Plaintiffs submit that this Court should follow its usual rule of refusing to consider on a petition for certiorari any issue not raised on the basic appeal below. Delta Air Lines v. August, 450 U.S. 346, 362 (1981); United States v. Ortiz, 422 U.S. 891, 898 (1975) (court of

appeals misled by government's statements on appeal); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); California v. Taylor, 353 U.S. 553, 556 n.2 (1957). Under the circumstances of this case, the defendants' decision to wait until they had lost their appeal on the merits---before reversing their position and arguing in their petition for rehearing that the district court had failed to find subjective discrimination--- should not be considered a proper raising of the issues below.

CONCLUSION

Plaintiffs respectfully pray that

the Court deny the defendants' petition for a writ of certiorari.

Respectfully sumbitted,

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Dated: November 3, 1982

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE, et al.,

Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., et al.,

Defendants.

No. DC 72-13-S Filed: January 25, 1979

ORDER

Due to the complexity of the issue of the necessity for and extent of any further injunctive relief in this cause, and the difficulty of the issue of entitlement of the named plaintiffs and members of the plaintiff class to back pay awards, such issues, pursuant to 28 U.S.C. §636(b)(2), Rule 53, F.R.Civ.P., and Local Rule M-2(d)(1) and (2), are hereby referred to United States Magistrate Charles M. Powers, as a Special Master with the fullest extent of powers available under Rule 53,

for preparation and submission of a report on said issue containing appropriate findings of fact and conclusions of law.

In accordance with the court's Memorandum of Decision entered herein on February 19, 1976, Payne v. Travenol Laboratories, Inc., 416 F.Supp. 248 (N.D.Miss. 1976), and the decision of the Fifth Circuit Court of Appeals entered herein on January 6, 1978, Payne v. Travenol, 565 F.2d 895 (5th Cir. 1978) (as amended on denial of rehearing and rehearing en banc March 23, 1978), back pay claims of members of the plaintiff class, defined as:

> All present, past, and future black female employees and all present, past, and future black female applicants for employment at the facility operated by the defendants at Cleveland, Mississippi, subject, however, to this limitation, that is to say, all black female applicants for employment at said facility prior to March 3, 1970, and all black female employees whose employment terminated prior to March 3, 1970, are excluded from the class; the class shall be subject to the further limitations

that all black female applicants who lack a tenth grade education or equivalency or who were not referred for employment at the Cleveland facility by the Mississippi State Employment Service during the period such referral was required, are excluded from the class

which shall be considered by the Special Master shall include:

(1) Claims of denial of employment in production jobs because of subjective discrimination in job interviews prior to February 19, 1976;

(2) Claims of denial of employment in office and clerical, technician, apprentice mechanic, and supervisory jobs because of the twelfth grade requirement;

(3) Claims of denial of promotion to supervisory jobs because of the twelfth grade requirement;

(4) Claims of denial of promotion to jobs above the level of operative because of the length of service criteria;

(5) Claims of denial of promotion to jobs above the level of operative because of the supervisor recommendation requirement;

(6) Claims of denial of transfer or promotion from assembler to material

handler because of the practice concerning "hooks" material handler positions;

(7) Claims of denial of employment in analyst jobs because of the college degree requirement;

(8) Claims based on mandatory fixed maternity leave; and

(9) Claims of discriminatory lay-off due to the "last-hired, first-fired" lay-off policy.

All issues concerning award of attorney fees to plaintiffs are reserved by the court.

ORDERED, this the 24th day of January, 1979.

/s/ Orma R. Smith
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIE MAE PAYNE, et al.,

Plaintiffs,

v.

TRAVENOL LABORATORIES, INC., et al.,

Defendants.

No. DC 72-13-S Filed: January 25, 1979

ORDER

To whatever extent there remains confusion among the parties concerning the following issues in this cause, no findings of fact other than the express and implicit findings in the Memorandum of Decision entered on February 19, 1976, and those necessitated by the order appointing Special Master this date entered herein shall be made, and at this juncture no change in the definition of the plaintiff class previously certified herein is

contemplated by the court.

This the 24th day of January, 1979.

/s/Orma R. Smith
United States District Judge